JD–16–97
Grand Rapids, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BENTELER INDUSTRIES, INC.

and

Case 7–CA–38088
7–CA–38103
7–CA–38445

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA

Howard Dodd, Esq., for the General Counsel.
Timothy J. Ryan, Esq., of Grand Rapids, MI,
for the Respondent.

DECISION

Statement of the Case

RICHARD A. SCULLY, Administrative Law Judge. Upon charges filed on January 26, January 30 and April 23, 1996, by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the Union), the Regional Director, Region 7, National Labor Relations Board (the Board), issued consolidated complaints on March 28 and June 11, 1996, alleging that Benteler Industries, Inc. (the Respondent), had committed certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (the Act). The Respondent filed timely answers denying that it had committed any violation of the Act.

A hearing was held in, Grand Rapids, Michigan, on, October 22, 1996, at which all parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument. A brief submitted on behalf of the Respondent has been given due consideration. Upon the entire record, and from my observation of the demeanor of the witnesses, I make the following

Findings of Fact

I. The Business of the Respondent

At all times material, the Respondent was a corporation with offices and places of business located at 320 Hall Street, SW, and 3721 Hagen Drive, SE, Grand Rapids, Michigan, engaged in the manufacture and non-retail sale of automotive metal components.

During the calendar year 1995, the Respondent, in conducting its business operations, sold and shipped from its Grand Rapids facilities, products valued in excess of $50,000 directly to points located outside the State of Michigan. The Respondent admits, and I find, that at all times material it has been an employer engaged in commerce within the meaning of Section

2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

The Respondent admits, and I find, that at all times material the Union was a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Section 8(a)(1)

1. Bulletin Board Access

The Union won a secret ballot election conducted by the Board among the production and maintenance employees at the Hall Street facility and has been their collective-bargaining representative since February 17, 1995.

The Respondent maintains bulletin boards at both the Hagen Drive and Hall Street facilities. The complaint alleges that it has unlawfully denied employees permission to post Union-sponsored literature on and has removed such literature from those boards, on which it has permitted employees to post other kinds of literature. At the Hagen Drive facility, there are a number of glass-enclosed, locked bulletin boards on the wall of the main aisle near the employees' entrance. On a section of one of these boards, designated, "Bargain Corner," employees are permitted to post notices. In order to have an item posted on the locked board, an employee must take it to the Human Resources office and give it to the secretary, who types it onto Bentler stationery and posts it on the board. There are also unenclosed cork bulletin boards in several of the departments. At the Hall Street facility, there are two sets of bulletin boards. There is a bank of boards about 30 feet long and four feet high in the middle of the plant by the lockers and a smaller, five by four foot, board outside the cafeteria. These boards are glass-enclosed and locked. Employees are permitted to post notices on a small section of a board in each location, which is labeled, "Miscellaneous,". To post an item on these boards, an employee must bring it to the Human Resources office. If it meets the Respondent's criteria, it is initialed by someone in that office and posted.

On January 17, 1996,[1] during a break, employee Brenda Brooks posted a notice for a Union organizing meeting on one of the open bulletin boards in the Ford department at the Hagen Drive plant. When she was returning from the break, she saw that the notice was gone. She asked supervisor Jim Hiler what happened to it and he said that he had taken it down. When she attempted to post another notice, Hiler told her she could not and took it down. Also in January, employee Brenda Matthews attempted to post two Union notices on an open board in her department but when she returned they were gone. Brooks and Matthews went to the Human Resources office and asked to have two Union notices posted. They were told they would have to speak with Human Resources manager Jim Kerschen. When they spoke to Kerschen, he said he would have to check and get back to them. When he did not, they went back a day or two later and Kerschen told them the notices could not be posted.

Employee Daniel Hampsall is the chairman of the employees' bargaining committee at the Hall Street plant. On February 13, he went to the Human Resources office, accompanied by employee Teresa Schuelke, and asked to have three notices posted announcing a Union

[1] Hereinafter, all dates are in 1996 unless otherwise indicated.

meeting and two union-sponsored classes. When the notices were not posted, he spoke to Human Resources Manager Steve Moore on February 16, with employee Paul Williams also present. Moore told them that the notices could not be posted. Schuelke also went to ask about the notices after a few days. Moore told her that he wasn't going to post the notices and that they involved solicitations because the Union was attempting to collect dues. On April 8, Hampsall took another notice announcing a Union meeting to the Human Resources office and asked Moore's secretary to post it. Later that day, he met with Moore who told him that it would not be posted as he only had to post notices concerning items employees wanted to sell.

Kerschen testified that the open bulletin boards in the Hagen Drive plant were put up during 1995, that they are restricted to Employer communications, and that they are not available for use by employees. He has seen employee materials on these boards but has not approved such postings and has removed them or had supervisors do so. He refused to permit the Union materials Brooks and Matthews asked to have posted because they did not meet the criteria used for postings on the "Bargain Corner" section of the bulletin board. He described that criteria as: "Basically, it has to be an item of personal nature of the employee. Usually something for sale. It could possibly be a thank you card or a get well type of card. Usually thank you card type things. Personal notices, that type of thing." He said that he has refused to post notices concerning a church dinner or dance, sales of sandwiches, and Avon products. Moore testified that the criteria for postings on the "Miscellaneous" sections of the bulletin boards at the Hall Street plant is that it must involve the sale of a personal item of an employee, such as, a boat, stereo or car. He said that he refused to post the Union notices requested by Hampsall because they did not involve the sale of personal items. He denied saying anything to Schuelke about the posting involving an attempt to solicit union dues.

Anaysis and Conclusions

The section in the Respondent's employee handbook entitled, "Bulletin Boards," states:

> There are bulletin boards located throughout each of the office and plant locations. Their purpose is to keep every employee informed about such things as promotional opportunities and other job related items, news of general interest about the company and information about policies, practices, benefits, etc. Check the bulletin boards regularly.

It is clear from the testimony of Kerschen and Moore, company officials with responsibility for what goes on the bulletin boards, that the Respondent does not strictly adhere to the policy stated in the handbook. Their testimony shows that employees are allowed to use the bulletin boards to publish personal items and that there are no precise guidelines governing such use. Moore apparently limits the use of the "Miscellaneous" section of the boards at the Hall Street facility to notices concerning sales of personal items, while Kerschen allowed employees to use the "Bargain Corner" section of the board at the Hagen Drive plant to post personal notices, thank you and get well cards, and items for sale. The credible testimony of Brooks and Matthews also establishes that employees have posted materials on the open boards at the Hagen Drive plant relating to party invitations, golf tournaments and a "big buck" contest which have remained posted for extended periods.

Board law is well established that there is no statutory right of employees or a union to use an employer's bulletin board. However, if the employer permits employees to use its bulletin board for the posting of notices relating to personal, nonwork-related items such as sales of personal property, cards, and thank you notes, it cannot validly discriminate against

notices of union meetings which employees have posted. Moreover, in such cases, the employer's motivation, no matter how well meant, is irrelevant. E.g., *St. Anthony's Hospital*, 292 NLRB 1304, 1307 (1989); *Honeywell, Inc.*, 262 NLRB 1402 (1982).

The Respondent relies on the decision of the U.S. Court of Appeals for the Seventh Circuit in *Guardian Industries Corp. v. NLRB*, 49 F. 3d 317 (7th Cir. 1995), which held an employer that permitted employees to post only notices of personal items for sale on its bulletin board was not obligated to permit the posting of union literature. It contends that its policy is essentially the same and that it may, likewise, lawfully prohibit such postings. The agrument fails for two reasons. First, the evidence establishes that the Respondent's practice is not identical to the policy considered in *Guardian Industries* since it has not consistently restricted employee postings on the locked boards, to which it controls access, to items for sale, but has also permitted the posting of other nonwork-related personal items such as a newspaper picture of an employee, get well cards and thank you notes. Second, and more important, the Court of Appeals for the Sixth Circuit, in which the Respondent's plants are located, agrees with the Board and has consistently held that "where, by policy or practice, the company permits employee access to bulletin boards *for any purpose*, section 7 of the Act, 29 U.S.C. section 157, secures the employees' right to post union materials." [Emphasis supplied]. *Roadway Exp., Inc. v. NLRB*, 831 F. 2d 1285, 1290 (6th Cir. 1987); *United Carbide v. NLRB*, 714 F. 2d 657, 660 (6th Cir. 1983). By refusing its employees' requests to post Union literature on bulletin boards where it has previously posted nonwork-related materials for other employees, the Respondent violated Section 8(a)(1) of the Act.

2. Distribution of Literature

The complaint alleges that the Respondent violated Section 8(a)(1) by prohibiting employees from distributing Union literature in a nonwork area during nonworking time. On December 19 or 20, 1995, during a break, Brenda Brooks was passing out Union handbills at the Hagen Drive plant in bench area near the lockers, a nonwork area, where employees gather before and after work. Supervisor George Rigles told her that she could not hand out the literature in that area. She asked why and Rigles said that his supervisor, Mark D'Angelo, had said that she could not do so. Brooks went to D'Angelo and asked why she could not hand out the literature in the bench area and he said he would have to check and get back to her. In early January, D'Angelo told her that the bench area was a nonworking area and it was okay for her to pass out Union literature in that area. The section in the employee handbook entitled, "Solicitation and Distribution," states:

> Solicitation for any cause is not allowed during working time. Distribution of any literature for any cause is similarly not allowed at any time in any working area of the plant. This policy applies to religious, fraternal, charitable and all other solicitations.
>
> For purposes of this policy, "work time" does not include lunches, breaks or other periods of time when employees are not scheduled to be working. "Work areas" include any work area in the plant, but do not include break areas, cafeterias or parking areas outside the plant.

Analysis and Conclusions

The Respondent does not dispute that the incident involving Brooks and Rigles took place but contends that there was no violation of the Act because it does not have an overly-

broad rule concerning distribution of literature in nonworking areas and that the mistaken action of its supervisor in telling Brooks not to distribute literature in the bench area has been fully cured, citing, *Atlantic Forest Products*, 282 NLRB 855(1987) and *Phillips Industrial Components, Inc.*, 216 NLRB 885 (1978). In the former case, within one-half to three hours after three employees were instructed to remove the union buttons they were wearing, they were each told that those instructions were mistakes and that they could be wear the buttons. The Board affirmed the administrative law judge's finding that the instructions were effectively cured by their prompt recission and that the allegations based on them should be dismissed. In the latter, in the morning, before work, a supervisor told an employee he could not solicit union authorization cards on company property but by lunchtime informed him that it was permissible to solicit on company property during his own nonworking time. The Board found that there was in effect no interference with the employee's solicitation activity and that the initial blanket no-solicitation was effectively cured by its immediate retraction only a few hours later.

The issue here is not whether there was a violation of the Act, as clearly there was, but whether a remedy is called for under the circumstances. Since the Respondent did not act promptly, as did the employers in the cited cases (within a few hours on the same day) to retract Rigles' instructions prohibiting distribution of Union literature in the bench area, it cannot be concluded that there was effectively no interference with the employees' right to do so. Also, given the fact that it did not acknowledge or repudiate the unlawful act and that it subsequently committed related violations infringing on employees' rights, the finding of a violation is warranted. See *Farm Fresh*, 305 NLRB 887 fn. 1 (1991). I find that Rigles' instruction to Brooks not to distribute Union literature in the bench area violated Section 8(a)(1) and that D'Angelo's telling her, two or more weeks later, that it was okay to pass out literature in the bench area, did not effectively repudiate that unlawful action under the standards outlined in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

B. Section 8(a)(5) and (1)

In November 1995, the Respondent posted a notice informing employees that, effective January 1, 1996, there would be a change in shift preference practices. The new policy provided that eligible employees could exercise their shift preferences once every six months, but only during January and July. Previously, employees could exercise their shift preferences once every six months, but there was no restriction on the time of the year when they could do so. The Respondent did not give the Union notice or an opportunity to bargain prior to making this change.

The credible and uncontradicted testimony of Daniel Hampsall, who is a welder at the Hall Street plant, establishes that in December 1995, the Respondent reduced the number of welders it employed there by three, one of the four on each shift and that this reduction has resulted in an increase in Hampsall's workload. This was admittedly done without giving notice to the Union. The complaint alleges that these unilateral changes affected the terms and conditions of employment of employees in the Hall Street bargaining unit and violated Section 8(a)(5).

Analysis and Conclusions

The Respondent does not deny making a change in the shift preference procedure but contends that it was so slight and insubstantial as to not constitute a violation of the Act. It also contends that the reduction in the number welders employed in the unit was the result of employees bidding on and moving to other positions and was not a violation.

To be unlawful, a unilateral change from prior practice must be a " 'material, substantial and a significant' change from prior practice affecting a term or condition of employment." *Weather Tec Corp.*, 238 NLRB 1535, 1536 (1978). Job bidding procedures are a part of the employees' working conditions. *Schnadig Corp.*, 265 NLRB 147 (1982). I find that the change in the job bidding procedure involved here was material and substantial, as it affected all unit employees and, by restricting their exercise of shift preferences to January and July, it could in effect delay an employee's opportunity to do so for up to six months.

Although the Respondent claims that the welders in question voluntarily moved to other positions, they did so after being informed that the number of welders was being reduced and the fact remains that that 25 percent of the welder jobs were eliminated. There was no evidence of any significant change in the Respondent's business; rather, it apparently made a decision, like the employer in *Holmes & Narver*, 309 NLRB 146 (1992), "to continue doing the same work with essentially the same technology, but to do it with fewer employees by virtue of giving some of the employees more work assignments." Id. at 147. Under the circumstances, elimination of these unit positions was a mandatory subject of bargaining and the Respondent's unilateral action violated Section 8(a)(5).

Conclusions of Law

1. The Respondent, Benteler Industries, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time production and maintenance employees, including automation technicians, robotic technicians, floor inspectors, layout inspectors, the quality assurance secretary, materials records clerks, shipping and receiving employees and clerks, and leadpersons, employed by the Respondent at its 320 Hall Street, SW, Grand Rapids, Michigan, facility and at its warehouse facility located at 500 44th Street, SW, Wyoming, Michigan; but excluding all office clerical employees, guards and supervisors as defined in the Act and any employees of temporary work entities, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union has been the exclusive representative of all employees in the above-described unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment within the meaning of Section 9(a) of the Act.

5. The Respondent violated Section 8(a)(1) of the Act by refusing employees' requests to post Union-sponsored literature on bulletin boards at the Hagen Drive and Hall Street plants where it has permitted the posting of other personal, nonwork-related notices at the request of other employees and by telling an employee that she could not distribute Union-sponsored literature in the bench area at Hagen Drive plant, a nonwork area.

6. The Respondent violated Section 8(a)(5) and (1) of the Act by changing, effective January 1, 1996, the procedure by which employees may exercise shift preference rights and by eliminating welder positions in the bargaining unit at the Hall Street plant, without giving the Union prior notice and an opportunity to bargain about these changes.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by making unilateral changes in terms and conditions of employment, I shall recommend that it be ordered to restore the status quo ante by rescinding those changes upon request by the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER[2]

The Respondent, Benteler Industries, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing employees' requests to post Union-sponsored literature on bulletin boards at the Hagen Drive and Hall Street plants where it has permitted the posting of other personal, nonwork-related notices by other employees.

(b) Telling employees that they cannot distribute Union-sponsored literature in the bench area at Hagen Drive plant, a nonwork area.

(c) Refusing to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit by making changes in the terms and conditions of employment of such employees without giving the Union prior notice and an opportunity to bargain about such changes.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify the Union concerning all proposed changes in wages, hours and other terms and conditions of employment of employees in the appropriate unit and, upon request, bargain with the Union about such changes.

(b) Upon request by the Union, rescind the unilateral changes it has made in the procedure for employees to exercise shift preferences and eliminating welder positions at the Hall Street plant and restore the status quo ante.

---

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days after service by the Region, post at its facilities in Grand Rapids, Michigan, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 30, 1997

_____
Richard A. Scully
Administrative Law Judge

[3] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse our employees' requests to post Union-sponsored literature on bulletin boards at the Hagen Drive and Hall Street plants where we have permitted the posting of other personal, nonwork-related notices by other employees.

WE WILL NOT tell our employees that they cannot distribute Union-sponsored literature in the bench area at Hagen Drive plant, a nonwork area.

WE WILL NOT refuse to bargain with the Union as the exclusive collective-bargaining representative of our employees in the appropriate unit by making changes in the terms and conditions of employment of such employees without giving the Union prior notice and an opportunity to bargain about such changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL notify the Union concerning all proposed changes in wages, hours and other terms and conditions of employment of employees in the appropriate unit and, upon request, bargain with the Union about such changes.

WE WILL upon request by the Union, rescind the unilateral changes involving the procedure for employees to exercise shift preferences and eliminating welder positions at the Hall Street plant and restore the status quo as it existed before those changes were made.

BENTELER INDUSTRIES, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226–2569, Telephone 313–226–3219.